JD(ATL)–83–03
Annville, KY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

MID–SOUTH ELECTRONICS, INC.

and **CASE 9–CA–40301**

TEAMSTERS LOCAL UNION NO. 783, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL–CIO

Kevin P. Luken, Esq.,
for the General Counsel
Mr. James Thomason,
of Louisville, Kentucky,
for the Charging Party
R. Kent Henslee, Esq.,
(Henslee, Robertson, Strawn and Knowles, L.L.C.) ,
of Gadsden, Alabama,
for the Respondent

BENCH DECISION AND CERTIFICATION

Statement of the Case

KELTNER W. LOCKE, Administrative Law Judge: I heard this case on October 29, 2003 in London, Kentucky. After the parties rested, I heard oral argument, and on October 30, 2003, issued a bench decision pursuant to Section 102.35(a)(1) of the Board's Rules and Regulations, setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A," the portion of the transcript containing this decision.[1] The Conclusions of Law, and Order provisions are set forth below.

[1] The bench decision appears in uncorrected form at pages 237 through 250 of the transcript. The final version, after correction of oral and transcriptional errors, is attached as Appendix A to this Certification.

CONCLUSIONS OF LAW

1. The Respondent, Mid–South Electronics, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party, Teamsters Local Union No. 783, affiliated with the International Brotherhood of Teamsters, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act as alleged in paragraph 6 of the Complaint and Notice of Hearing but did not otherwise violate the Act.

4. The unfair labor practice described in paragraph 3, above, affects commerce within the meaning of Section 2(6) and (7) of the Act, but is isolated and de minimus.

5. Further action in this matter would not effectuate the purposes and policies of the Act.

On the findings of fact and conclusions of law herein, and on the entire record in this case, I issue the following recommended[2]

ORDER

The Complaint is dismissed.

Dated Washington, D.C.

Keltner W. Locke
Administrative Law Judge

[2] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

Appendix A

Keltner W. Locke, Administrative Law Judge. This is a bench decision issued pursuant to Section 102.35(a)(10) and Section 102.45 of the Board's Rules and Regulations. The complaint alleges two violations of Section 8(a)(1) of the Act. I find that the first of these alleged violations did not occur. Although I find that the second did take place, I conclude that it was isolated and de minimus.

Procedural History

This case began on June 10, 2003, when the Charging Party, Teamsters Local Union Number 783, affiliated with the International Brotherhood of Teamsters, AFL–CIO, filed its initial charge in this proceeding. I will refer to the Charging Party as the "Union."

On August 13, 2003, the Union amended its unfair labor practice charge. On August 29, 2003, after investigation of the charge, the Regional Director for Region 9 of the National Labor Relations Board issued a Complaint and Notice of Hearing, which I will call the "Complaint."

In issuing this complaint the Regional Director acted on behalf of the General Counsel of the Board, whom I will refer to as the "General Counsel" or as the "government." Respondent filed a timely answer to the complaint. On October 29, 2003, a hearing in this matter opened before me in London, Kentucky. After all parties rested, Counsel presented oral argument. Today, October 30, 2003, I am issuing this bench decision.

Undisputed Matters

In its answer, Respondent has admitted many of the allegations raised by the complaint. Based on these admissions, I find that the Government has proven the allegations set forth in Complaint Paragraphs 1(a) and 1(b), 2(a), 2(b) and 2(c), 3 and 4.

More specifically, I find that Respondent is a corporation which manufactures refrigerator ice makers in its facility in Annville, Kentucky. At all times material to this case, Respondent has been an employer engaged in commerce within the meaning Sections 2(2), (6) and (7) of the Act, and thereby falls within the Board's statutory jurisdiction. Additionally, based upon its purchase and receipt of goods directly from sources outside the State of Kentucky, I conclude that Respondent satisfies the Board's discretionary standards for the assertion of jurisdiction.

Based on the admissions in Respondent's answer, I find that at all material times, the union has been a labor organization within the meaning of Section 2(5) of the Act. Also based on Respondent's admissions, I find that at all material times, Human Resources Manager Frank D. Elkins and Second Shift Superintendent John L. Neely were Respondent's supervisors and agents within the meaning of Sections 2(11) and 2(13) of the Act, respectively.

Disputed Allegations

The Complaint alleges that Respondent violated Section 8(a)(1) of the Act by two specific actions described in Complaint paragraphs 5 and 6. Respondent has denied these allegations.

Complaint paragraph 5 alleges as follows: "About May 28, 2003, Respondent, by John L. Neely, at its Annville, Kentucky facility, threatened an employee with physical harm for engaging in protected concerted activity."

Complaint paragraph 6 alleges as follows: "About May 29, 2003, Respondent, by Frank D. Elkins, at its Annville facility, threatened an employee with unspecified reprisals in order to discourage the employee from engaging in protected concerted activity."

The remaining disputed complaint paragraphs allege that these actions constituted unfair labor practices effecting commerce and violate Section 8(a)(1) of the Act.

Credibility of Witnesses

In this case various witnesses gave markedly conflicting testimony. The case turns on which witnesses were telling the truth. Therefore it may be helpful to begin by evaluating their credibility.

The General Counsel's main witness, Dorothy Baker, gave testimony supporting both of the 8(a)(1) allegations. Baker participated in the Union's campaign to organize Respondent's workers. She described an incident which took place on May 28, 2003, near the assembly line on which she works.

Another employee, Virgil Hollan, had initiated a conversation wit Superintendent Neely, and was asking Neely about unions. Baker overheard part of this conversation from her work station and she testified that she "hollered over and tell him you can not trust a salaried man to answer a Union question."

According to Baker, Superintendent Neely came over to her and stood so close that his nose and hers were only a hands–breadth apart. She testified that he pointed his finger at her and said "You'd better shut that mouth. We don't pay you for running your mouth. You shut that mouth or I'll bust your face." This is the conduct alleged in Complaint paragraph 5.

However, I do not have confidence in Baker's testimony and do not credit it. I base that decision in part on my observations of Baker's demeanor as she testified. During much of her testimony, Ms. Baker's voice sounded tremulous, suggesting a level of apprehension beyond the degree of anxiety a witness typically manifests on the stand.

However, when Ms. Baker described how Neely spoke to her during this confrontation, she became loud and dramatic. This shift in tone gave her testimony a certain theatrical quality which made me doubt its fidelity to fact.

Portions of Ms. Baker's testimony also were implausible. For example, she testified that when Superintendent Neely threatened to "bust her face" she was "scared to death." However, she then testified that she responded to Neely's statement by telling him that if there was to be any face–busting then "I'll bust yours." A person so intimidated that she is "scared to death", does not stand up to a threat in so bold a manner and counter with a threat of her own.

Ms. Baker further testified that after she told Neely "I'll bust yours," he trembled. Having observed both Baker and Neely as they testified, I find it highly improbably that Neely would tremble.

Both Baker's testimony and that of other witnesses creates a consistent picture of Baker as a person who construed negative or slightly negative remarks as being highly offensive. For example, at the start of an employee meeting, superintendent Neely offered Baker a chair. She testified that when Neely made this gesture, "I was in a state of shock" and responded by asking Neely, "What? Am I special now?" Normally a person does not go into a "state of shock" or react with a sarcastic remark when someone else extends a courtesy.

For these reasons, I conclude that Ms. Baker viewed events from the perspective of a dramatist rather than a reporter, and I have substantial doubts about her testimony. Therefore I do not credit it.

Based upon my observations of John Neely as he testified, I have considerable confidence that his recollection of the facts is accurate. Moreover, other witnesses who worked under Neely's supervision consistently described him in a favorable manner, consistent with the impression he made while on the witness stand. I conclude that his testimony is accurate and credit it.

Additionally, based upon my observation of the witnesses, I conclude that Human Resources Manager Frank D. Elkins testified honestly and accurately. As in the case of Neely, I credit Elkins' testimony over that of conflicting witnesses and rely on the testimony of Neely and Elkins in describing what actually happened.

Also, certain of the General Counsel's witnesses gave testimony consistent with Baker's account. I do not credit this testimony in part because fewer witnesses corroborated Baker than contradicted her.

Moreover, I focus considerable attention on the testimony of one witness, Virgil Hollan, because he was in a position to observe the events up close. Hollan had asked Neely a question when Baker interrupted. Thus he was close when the alleged confrontation between Baker and Neely took place. However Hollan testified that Neely was not in Baker's face, and in fact at no time was Neely close enough to Baker to touch her. Moreover, Hollan credibly testified that he heard nothing about hitting from either Baker or Neely.

In sum, I do not credit the General Counsel's witnesses concerning the exchange between Baker and Neely on May 28.

Complaint Paragraph 5

In evaluating the credibility of the various witnesses, I have already described the events which formed the basis for Complaint paragraph 5.

Crediting Neely, I find that he did not threaten Baker with physical harm. He did tell Baker to quote, "Watch your mouth." Under certain circumstances, such a statement in context might constitute a threat which interfered with employees in the exercise of Section 7 rights.

A number of factors could make Neely's irritated remark be understood as a threat of unspecified reprisal for union activity. These factors include: Management committing other unfair labor practices which communicated hostility to the union, management campaigning against the union in such a way that it manifested hostility to the union, and other action by Superintendent Neely that would show his tendency to retaliate against employees who supported the union.

None of these factors is present in the instant case. No employee described Neely as being hostile to the Union. Instead, employee witnesses uniformly characterized him as a "nice guy." Similarly, the record contains no evidence to suggest that Respondent campaigned against the union organizing effort, displayed hostility to the union, or created an atmosphere in which employees would fear retaliation for union activity.

It is true that Neely was talking with an employee about unions when Baker interrupted with a comment that the employee should not trust what a salaried person said about unions. It is also true that Neely reacted with irritation to this intrusion even though he did not, as the complaint alleged, threaten any physical harm. However in context, employees reasonably would not view Neely's comment as signifying anti–union animus, but rather as his momentary reaction to being interrupted in an annoying way.

Neely credibly described Baker as not simply yelling but screaming. Even Baker herself admitted that she hollered. Neely's "watch your mouth" comment was simply an impulsive reaction to this annoyance and employees reasonably see it in that light.

Crediting Neely, I find that he did not threaten an employee with physical harm as alleged in Complaint Paragraph 5, and that he did not otherwise engage in conduct which violated the Act. Therefore, I recommend that these allegations be dismissed.

Complaint Paragraph 6

Complaint paragraph 6 alleges that on about May 29, 2003, Respondent's human resources manager, Frank Elkins, "Threatened an employee with unspecified reprisals", end quote, to discourage the employee from engaging in protected activity." However the General Counsel actually litigated this allegation under a different theory. Namely that Elkins had prohibited an employee from discussing a work related matter with other employees.

After the May 28 exchange between Baker and Neely, Baker went to the human resources office to file a complaint against Neely. She talked to Elkins about this matter and he

said he would investigate. Baker testified, in essence, that Elkins told her not to discuss the matter with other employees.

Additionally she testified that when she returned to Elkins' office for a second meeting, Elkins told her to "keep her mouth shut." For reasons already discussed, I do not credit Baker's testimony.

Crediting Elkins, I find that at the end of his first meeting with Baker, he told her that he was going to investigate her complaint and that he would appreciate her not talking about the matter with other employees until he completed the investigation.

Elkins made this request for much the same reason that the General Counsel invoked the sequestration rule at the start of this hearing. He didn't want the memory of one witness to affect the recollection of another.

Further crediting Elkins, I find that when he met with Baker again, he did not tell her or even request that she not discuss this matter with other employees. Elkins had arranged this second meeting with Baker to report the results of his investigation. He told Baker that most of the witnesses interviewed did not substantiate her account and that he was not going to take any action against Neely.

On the witness stand, Elkins unequivocally denied telling or asking Baker at this second meeting not to discuss this matter with other workers. I credit Elkins' denial.

However at the first meeting Elkins did ask Baker not to discuss the matter pending completion of the investigation, and I must decide whether this request interferes with protected employee rights in violation of Section 8(a)(1) of Act.

There is no doubt that employees have the right to discuss matters related to working conditions, and the alleged misconduct of a supervisor towards an employee certainly falls within that category. Indeed, if Neely in fact had made the threat attributed to him, that action certainly could affect an employee's decision about the need for union representation.

When Elkins requested that Baker not discuss the matter while it was under investigation, he clearly did not intend this request to interfere with employees exercising their right to discuss this significant employment–related matter. Rather, he simply wanted to protect the quality of his investigation.

In this regard it may be noted that in his work for Respondent, Elkins had investigated allegations concerning two other supervisors, and in both those instances the investigations resulted in the discharge of the supervisors. Elkins' concern about the quality of the investigation was understandable.

However, it is well established that intent is not an element of an 8(a)(1) violation. The Board looks not to what management intended by a particular action, but rather to the effect the action reasonably would have on the exercise of protected rights. See, e.g., *Technology Service Solutions*, 332 NLRB No. 100 (October 31, 2000). Legally and logically. a restriction on employee discussion of this employment–related matter is no different from a rule prohibiting

employees from talking among themselves about their wage rates. The Board has long found such rules unlawful.

Moreover, it does not matter that Elkins simply requested that Baker refrain from discussion, rather than ordered her to keep quiet. In *Radisson Plaza Minneapolis*, 307 NLRB 94 (1992), the Board, citing *Heck's, Inc.*, 293 NLRB 1111, 1119 (1989) and *Waco, Inc.*, 273 NLRB 746 (1984), stated:

> Thus *Heck's* and *Waco* make clear that a finding of a violation is not premised on mandatory phrasing, subjective impact or even evidence of enforcement, but rather on the reasonable tendency of such a prohibition to coerce employees in the exercise of fundamental rights protected by the Act.

307 NLRB at 94.

Based on this precedent, I conclude that Respondent, through Elkins, did violate Section 8(a)(1) of the Act when Elkins requested Baker not to talk about her encounter with Neely while the investigation was underway. However this violation had very little, if any, effect on the exercise of employee rights. The investigation took only about a day. Moreover, the record indicates that employees did discuss the matter among themselves.

There is no evidence that any employee was disciplined for doing so. Indeed, the record establishes that Respondent had a policy of encouraging employees to talk among themselves, and I find that Respondent had no rule restricting employees concerning the topics they discussed.

Dorothy Baker did testify that management told employees not to talk about "the union, your sex life, anything that will offend anybody" but no other witness supported this testimony and I do not credit it. Even Baker, who claimed that such a rule existed, further testified that employees ignored it and talked about "whatever they want to."

For reasons already discussed, I do not credit Baker's testimony and find that Respondent had no such rule or policy. Additionally, I find that Elkins' request to Baker did not reflect any established policy or practice of Respondent. Therefore I conclude that it was isolated.

Because the violation was isolated and had little impact on the exercise of protected rights, I do not believe it would effectuate the purposes and policies of the Act to proceed on it. Therefore I recommend that the Board dismiss this matter as de minimus.

When the transcript of this proceeding has been prepared I will issue a certification which attaches as an appendix the portion of the transcript reporting this bench decision. This certification also will include provisions related to the Conclusions of Law, and Order. When that certification is served upon the parties, the time period for filing an appeal will begin to run.

Throughout this hearing all Counsel have acted with great professionalism and civility, which I truly appreciate. The hearing is closed.

BENCH DECISION

October 30, 2003 1:00 p.m.

JUDGE LOCKE: On the record. This is decision is issued pursuant to Section 102.35A10 and Section 102.45 of the Board's Rules and Regulations. The complaint alleges two violations of Section 8A-1 of the Act.

I find that the first of these alleged violations did not occur. Although I find that the second did take place, I conclude that it was isolated and deminimus. Off the record.

(Off the record)

JUDGE LOCKE: On the record. Procedural history. This case began on June 10th, 2003, when the Charging Party, Teamsters Local Union Number 783, affiliated with the International Brotherhood of Teamsters, AFL-CIO, filed its' initial charge in this proceeding. I will refer to the Charging Party as the Union.

On August 13, 2003, the union amended its' unfair labor practice charge. On August 29, 2003, after investigation of the charge, the Regional Director of Region Nine of the National Labor Relations Board issued a complaint and Notice of Hearing, which I will call the complaint.

In issuing this complaint the Regional Director acted on behalf of the General Counsel of the Board, whom I will refer to as the General Counsel or as the Government. Respondent filed a timely answer to the complaint. On October 29, 2003, a hearing in this matter opened before in London, Kentucky. After all parties rested, Counsel presented oral argument. Today, October 30, 2003, I am issuing this bench decision.

Undisputed matters. In its' answer, Respondent has admitted many of the allegations raised by the complaint. Based on these admissions, I find that the Government has proven the allegations set forth in Complaint Paragraphs 1(a) and 1(b), 2(a), 2(b) and 2(c), 3 and 4.

More specifically, I find that Respondent is corporation which manufacturers refrigerator ice makers in its' facility in Annville, Kentucky. At all times material to this case, Respondent has been an Employer engaged in commerce within the meaning Sections 2-2-6 and Seven of the Act, and thereby falls within the Board's statutory jurisdiction.

Additionally, based upon its' purchase and receipt of goods directly from sources outside the State of Kentucky, I conclude that Respondent satisfies the Board's discretionary standards for the assertion of jurisdiction.

BENCH DECISION

Based on the admissions and Respondent's answer, I find that at all material times, the union has been a labor organization within the meaning of Section 2.5 of the Act. Also based on Respondent's admissions -- off the record.

(Off the record)

JUDGE LOCKE: On the record. I find that at all material times, human resources manager, Frank D. Elkins, and second shift superintendent, John L. Neely, were Respondent's supervisors and agents within the meaning of Sections 2.11 and 2.13 of the Act respectively.

Disputed allegations. The Complaint alleges that Respondent violated Section 8A–1 of the Act by two specific actions described in Complaint Paragraphs Five and Six. Respondent has denied these allegations.

Complaint Paragraph Five alleges as follows: quote, "About May 28th, 2003, Respondent, by John L. Neely, at its' Annville, Kentucky facility, threatened an employee with physical harm for engaging in protected concerted activity", end quote.

Complaint Paragraph Six alleges as follows: quote, "About May 29, 2003, Respondent, by Frank D. Elkins, at its' Annville facility, threatened an employee with unspecified reprisals in order to discourage the employee from engaging in protected concerted activity", end quote.

The remaining disputed complaint paragraphs allege that these actions constituted unfair labor practices effecting commerce and violate Section 8A–1 of the Act.

Credibility of witnesses. In this case various witnesses gave markedly conflicting testimony. The case turns on which witnesses were telling the truth. Therefore it may be helpful to begin by evaluating their credibility.

The General Counsel's main witness, Dorothy Baker, gave testimony supporting both of the 8A–1 allegations. Baker participated in the union's campaign to organize Respondent's workers. She described an incident which took place on May 28, 2003, near the assembly line on which works.

Another employee, Virgil Hollan, had initiated a conversation wit superintendent Neely, and was asking Neely about Unions. Baker overheard part of this conversation from her work station and she testified, quote, "Hollered over and tell him you can not trust a salaried man to answer a Union question", end quote.

According to Baker's superintendent Neely, came over to her and stood so close that his nose and hers were only a hands–breadth apart, pointed his finger at her and

said, quote, "You'd better shut that mouth. We don't pay you for running your mouth. You shut that mouth or I'll bust your face.", end quote. This is the conduct alleged in Complaint Paragraph Five.

However, I do not have confidence in Baker's testimony and do not credit it. I base that decision in part on my observations of Baker's demeanor as she testified. During much of her testimony, Ms. Baker's voice sounded tremulous, suggesting a level of apprehension beyond the degree of anxiety a witness typically manifests on the stand.

However, when Ms. Baker described how Neely spoke to her during this confrontation, she became loud and dramatic. This shift in tone gave her testimony a certain theatrical quality which made me doubt as fidelity to the fact. Portions of Ms. Baker's testimony also were implausible. For example, she testified that when superintendent Neely threatened to quote, "bust her face", end quote, she was quote, "scared to death", end quote.

However, she then testified that she responded to Neely's statement by telling him that if was there was to be any face–busting then, quote, "I'll bust yours", end quote.

A person so intimidated that she is "scared to death", does not stand up to a threat in so bold a manner and counter with a threat of her own.

Ms. Baker further testified that after she told Neely quote, "I'll bust yours", end quote, he trembled. Having observed both Baker and Neely as they testified, I find it highly improbably that Neely would tremble.

Both Baker's testimony and that of other witnesses creates a consistent picture of Baker as a person who construed or slightly negative remarks as being highly offensive.

For example, at the start of an employee meeting, superintendent Neely offered Baker a chair. She testified that when Neely made this gesture, quote, "I was in a state of shock", end quote, and responded by asking Neely, quote, "What? Am I special now?", end quote.

Normally a person does not go into a "state of shock" or react with a sarcastic remark when someone else extends a courtesy.

For these reasons, I conclude that Ms. Baker viewed events from the perspective of a dramatist rather than a reporter. And I do not have -- and I have substantial doubts about her testimony. Therefore I do not credit it.

Based upon my observations of John Neely as he

testified, I have considerable confidence that his recollection of the facts is accurate.

Moreover, other witnesses who worked under Neely's supervision consistently described him in a favorable manner, consistent with the impression he made while on the witness stand. I conclude that his testimony is accurate and credit it.

Additionally, based upon my observation of the witnesses, I conclude that human resources manager, Frank D. Elkins, testified honestly and accurately. As in the case of Neely, I credit the Elkins' testimony over that of conflicting witnesses and rely on the testimony of Neely and Elkins in describing what actually happened.

Also certain of the General Counsel's witnesses give testimony consistent with Baker's account, I do not credit this testimony in part because fewer witnesses corroborated Baker than contradicted her.

Moreover, I focus considerable attention on the testimony of one witness, Virgil Hollan, because he was in a position to observe the events up close.

Hollan had asked Neely a question when Baker interrupted. Thus he was close when the alleged confrontation between Baker and Neely took place. However Hollan testified that Neely was not in Baker's face, and in fact at no time was Neely close enough to Baker to touch her. Moreover, Hollan credibly testified that he heard nothing about hitting from either Baker or Neely.

In sum, I do not credit the General Counsel's witnesses concerning the exchange between Baker and Neely on May 28th.

Complaint Paragraph Five. In evaluating the credibility of the various witnesses, I have already described the events which formed the basis for Complaint Paragraph Five.

Crediting Neely, I find that he did not threaten Baker with physical harm. He did tell Baker to quote, "Watch your mouth", end quote. Under certain circumstances, such a statement in context might constitute a threat which interfered with employees in the exercise of Section Seven rights.

A number of factors could make Neely's irritated remark be understood as a threat of unspecified reprisal for union activity.

These factors include: management committing other unfair labor practices which communicated as hostility to the

union, management campaigning against the union in such a way that it manifests hostility to the union, other action by superintendent Neely that would show his tendency to retaliate against employees who supported the union.

None of these factors is present in the instant case. No employee described Neely as being hostile to the Union. Instead, employee witnesses uniformly characterized him as a quote, "nice guy", end quote.

Similarly, the record contains no evidence to suggest that Respondent campaigned against union organizing effort or displayed hostility to the union, or created an atmosphere in which employees would fear retaliation for union activity.

It is true that Neely was talking with an employee about unions when Baker interrupted with a comment that the employee should not trust what a salaried person said about unions. It is also true that Neely reacted with irritation to this intrusion even though he did not, as the complaint alleged, threaten any physical harm.

However in context, employees reasonably would not view Neely's comment as signifying anti–union animus, but rather as his momentary reaction to being interrupted in an annoying way.

Neely credibly described Baker as not simply yelling but screaming. Even Baker herself admitted that she hollered. Neely's "watch your mouth" comment was simply an impulsive reaction to this annoyance and employees reasonably see it in that light.

Crediting Neely, I find that he did not threaten an employee with physical harm as alleged in Complaint Paragraph Five, and that he did not otherwise engage in conduct which violated the Act. Therefore, I recommend that these allegations be dismissed.

Complaint Paragraph Six. Complaint Paragraph Six alleges that on about May 29, 2003, Respondent's human resources manager, Frank Elkins, quote, "Threatened an employee with unspecified reprisals", end quote, to discourage the employee from engaging in protected activity.

However the General Counsel actually litigated this allegation under a different theory. Namely that Elkins had prohibited an employee from discussing a work related matter with other employees.

After the May 28th exchange between Baker and Neely, Baker went to the human resources office to file a complaint against Neely. She talked to Elkins about this

matter and he said he would investigate. Baker testified in essence that Elkins told her not to discuss the matter with other employees.

Additionally she testified that when she returned to Elkins' office for a second meeting, Elkins told her to quote, "Keep her mouth shut", end quote. For reasons already discussed, I do not credit Baker's testimony.

Crediting Elkins I find that at the end of his first meeting with Baker, he told her that he was going to investigate her complaint and that he would appreciate her not talking about the matter with other employees until he completed the investigation.

Elkins made this request for much the same reason that the General Counsel invoked the sequestration rule at the start of this hearing. He didn't want the memory of one witness to effect the recollection of another.

Further crediting Elkins I find that when he met with Baker again, he did not tell her or even request that she not discuss this matter with other employees.

Elkins had arranged this second meeting with Baker to report the results of his investigation. He told Baker that most of the witnesses interviewed did not substantiate her account and that he was not going to take any action against Neely.

On the witness stand, Elkins unequivocally denied telling or asking Baker at this second meeting not to discuss this matter with other workers. I credit Elkins' denial.

However at the first meeting Elkins did ask Baker not to discuss the matter pending completion of the investigation, and I must decide whether this request interferes with protected employee rights in violation of Section 8A–1 of Act.

There is not doubt that employees have the right to discuss matters related to working conditions, and the alleged misconduct of a supervisor towards an employee certainly falls within that category.

Indeed, if Neely had in fact made the threat attributed to him, that action certainly could affect an employee's decision about the need for union representation.

When Elkins requested that Baker not discuss the matter while it was under investigation, he clearly did not intend this request to interfere with employees exercising their right to discuss this significant employment related matter. Rather, he simply wanted to protect the quality of his investigation.

BENCH DECISION

In this regard it may be noted that in his work for Respondent, Elkins had investigated allegations concerning two other supervisors.

And in both those instances the investigations resulted in the discharge of the supervisors. Elkins' concern about the quality of the investigation was understandable.

However, it is well established that intent is not an element of an 8A–1 violation. The Board looks not to what management intended by a particular action, but rather to the effect of the action -- rather to the effect the action reasonably would have on the exercise of protected rights.

(C–E–G), Technology Service Solutions, and International Brotherhood of Electrical Workers, AFL–CIO, Local 111, 332NLRB100, October 31, 2000.

Legally an logically a restriction on employee discussion of this employment related matter is no different from a rule prohibiting employees from talking among themselves about their wage rates. The Board has long found such rules unlawful.

Moreover, it does not matter that Elkins simply requested that Baker refrain from discussion, rather than ordered her to keep quiet. In Radisson Plaza, Minneapolis, 307NLRB94, 1992, the Board citing Hex, Inc., 293NLRB1111–1119, 1989, and Waco, Inc., 273NLRB746, 1984, stated, quote, "Thus Hex and Waco make clear that a finding of a violation is not premised on mandatory phrasing, subjective intent or even evidence of enforcement but rather on the reasonable tendency of such a prohibition to coerce employees in the exercise of fundamental rights protected by the Act.", end quote, 307NLRB94.

Based on this president, I conclude that Respondent through Elkins did violate Section 8A–1 of the Act when Elkins requested Baker not to talk about her encounter with Neely while the investigation was underway.

However this violation had little -- very little, if any, effect on the exercise of employee rights. The investigation took only about a day. Moreover, the record indicates that employees did discuss the matter among themselves.

There is no evidence that any employee was disciplined for doing so. Indeed, the record establishes that Respondent had a policy of encouraging employees to talk among themselves. And I find that Respondent had no rule restricting employees concerning the topics they discussed.

BENCH DECISION

Dorothy Baker did testify that management told employees not to talk about quote, "the union, your sex life, anything that will offend anybody", end quote, but no other witness supported this testimony and I do not credit it. Even Baker, who claimed that such a rule existed, further testified that employees ignored it and quote, "Just talk about whatever they want to", end quote.

For reasons already discussed, I do not credit Baker's testimony and find that Respondent had no such rule or policy. Additionally, I find that Elkins' request to Baker did not reflect any established policy or practice of Respondent. Therefore I conclude that it was isolated.

Because the violation was isolated and had little impact on the exercise of protected rights, I do not believe it would effectuate the purposes and policies of the Act to proceed on it.

Therefore I recommend that the Board dismiss this matter as deminimus.

When the transcript of this proceeding has been prepared I will issue a certification which attaches as an appendix the portion of the transcript reporting this bench decision.

This certification also will include provisions related to the findings of fact, conclusions of law and order. When that certification is served upon the parties, the time period for filing an appeal will begin to run.

Throughout this hearing all Counsel have acted with great professionalism and civility, which I truly appreciate.

The hearing is closed. Off the record.

(Whereupon the hearing concluded at 1:20 p.m.)

* * *

BENCH DECISION

C E R T I F I C A T E

This is to certify that the attached proceedings before the National Labor Relations Board, were held according to the record and that this is the original, complete and true and accurate transcript which has been compared to the reporting and recording accomplished at the hearing, that the exhibit files have been checked for completeness and no exhibits received in evidence or in the rejected exhibits files are missing.

_____
NANCILYN RUTAN – OFFICIAL REPORTER

_____
Continued

MOLER REPORTING SERVICE, INC.
2115 Harker Waits Road
Williamsburg, Ohio 45176
(937) 444-4565